In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1530

ALVIN I. MALNIK, PETITIONER

v.

UNITED STATES OF AMERICA
AND CARL ROSEN, REVENUE AGENT OF THE
INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

On March 16, 1971, Carl K. Rosen, an Internal Revenue agent, issued a summons to petitioner under Sections 7602 and 7603 of the Internal Revenue Code of 1954, requiring him to appear for questioning and to produce certain designated documents for inspection relating to his tax liabilities for 1959, 1960, 1962 and 1963 (Pet. App. C 17-19). After consulting with Internal Revenue Service officials, petitioner's counsel informed the Internal Revenue Service by letter, acknowledged by petitioner, that "had [the petitioner] personally appeared [pursuant to the summons], 'he would have asserted his appropriate constitutional privileges to all relevant and material questions propounded to him and to the production of such of the records therein enumerated in his possession' "

(Pet. App. C 19). Interpreting this statement as an anticipatory "blanket" refusal to answer all questions, the Internal Revenue Service then waived the petitioner's appearance pursuant to the summons (Pet. App. C 19).

Thereafter, the Internal Revenue Service brought this action to enforce the summons, urging that the petitioner had improperly invoked the Fifth Amendment privilege on a "blanket" basis (Pet. App. B 8). In his defense of the summons enforcement proceeding, petitioner urged that he had properly invoked the Fifth Amendment and that, therefore, the petition for enforcement should be dismissed. The only showing petitioner made, however, was that (1) he had been previously tried and acquitted for tax evasion for two of the years involved; (2) during the course of the criminal trial, he had made representations to the government and had given sworn testimony; and (3) since his civil liability for two of the four years in question was under issue, giving responsive answers to any questions or producing any documents might tend to incriminate him (Pet. App. B 8-9).

After initially ordering the enforcement of the summons (Pet. App. A 1-5), the district court reconsidered its decision and ultimately refused to enforce the summons on two alternative grounds: First, it held that petitioner had properly invoked his Fifth Amendment privilege because either responding to any questions the Internal Revenue Service might ask or producing the documents called for might tend to incriminate petitioner. Secondly, the court held that the summons was overly broad and therefore unenforceable (Pet. App. B 6-16).

On appeal, the court of appeals affirmed. However, its decision was premised on the fact that the Internal Revenue Service had waived its right to seek enforcement because of its agreement with petitioner permitting

him to dispense with appearance in accordance with the summons. In its opinion, the court of appeals stated that the reasons given by the district court for refusing to enforce the summons were erroneous. The court of appeals ruled that petitioner had improperly invoked his Fifth Amendment privilege on a "blanket" basis because it could not be concluded from the record that production of the requested information might tend to incriminate petitioner. Moreover, the court of appeals stated that the summons was not overly broad (Pet. App. C 17-27).

2. The judgment of the court of appeals affirming the district court's refusal to enforce the summons is in petitioner's favor. Nevertheless petitioner seeks review by this Court because he disagrees with the conclusion of the court of appeals that he had not properly invoked his Fifth Amendment privilege. Although 28 U.S.C. 1254(1) permits "any party" to a case in the court of appeals to apply for a writ of certiorari, the granting of review in these circumstance would be inconsistent with this Court's settled practice of refusing to entertain an appeal (other than a cross petition) by a party successful in obtaining a final judgment in his favor in the court below. *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; *Lindheimer* v. *Illinois Tel. Co.*, 292 U.S. 151, 176; *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645. As the Court stated most recently in *United States* v. *Shirey*, 359 U.S. 255, 261, n. 5, "[t]his Court reviews judgments, not arguments assailing them or seeking to sustain them." The exceptional situation of certiorari before judgment is of course not present here; nor is the exception for cross petitions applicable since the government has not petitioned for certiorari from the judgment in petitioner's favor (and the time for petitioning has expired).

In light of the court of appeals' explicit disagreement with the district court's opinion as to the availability of the Fifth Amendment privilege on a "blanket" basis, it is plain that petitioner is seeking review at this time in order to determine the availability of the privilege in response to a possible future summons by the Internal Revenue Service. The issues with respect to such a hypothetical summons are not ripe for review at this time.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.